Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MITCHELL ENERGY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether the Commission may validly order refunds of all collections above generally applicable area rates if it has previously granted an independent producer authority to collect a higher rate on the representation that additional costs would be incurred for an extraordinary drilling program, and such costs have been incurred and justify the rate collected under cost-of-service standards historically used by the Commission.

2) Is the requirement that findings be supported by substantial evidence met when the Commission orders refunds in order to return an independent producer to the *status quo ante,* absent any record evidence demonstrating how the independent producer can be returned to its original position.

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No.

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Mitchell Energy Corporation,

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v.

Federal Energy Regulatory Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mitchell Energy Corporation[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A9) is reported at 662 F.2d IIII (5th Cir. 1981). The orders of the Federal Energy Regulatory Commission (Appendices B, C, *infra*, pp. A10-A19) are not yet reported.

[1]In accord with Rule 28.1, Mitchell Energy Corporation states that it has a parent corporation, Mitchell Energy and Development Corp., and one affiliate, Mitchell Energy Production Corp.

JURISDICTION

The Court of Appeals entered judgment on December 3, 1981 (Appendix D, *infra*, p. A22) and denied a timely tion for rehearing on January 13, 1982 (Appendix E, *infra*, pp. A23-A24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1976).

STATUTES INVOLVED

Sections 4, 5, and 19(b) of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, 717r (1976), are set forth in Appendix F, *infra*, pp. A25-A30.

STATEMENT OF THE CASE

Mitchell Energy Corporation (formerly George Mitchell and Associates, Inc., hereinafter "Mitchell"), is an independent producer of natural gas engaged, *inter alia*, in the exploration and development of natural gas reserves and in the sale of natural gas in interstate commerce subject to the jurisdiction of the Federal Energy Regulatory Commission (formerly the Federal Power Commission, hereinafter "Commission") under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1976).

This proceeding originated in 1972 when Mitchell sought special relief from the area rates for the Other Southwest Area ("OSWA") established by the Commission in Opinion No. 607[2] for all of Mitchell's natural gas production from the Booneville Bend Conglomerate Field, in the Wise County Area of Texas ("Wise County Area") and delivered under contract to the Natural Gas Pipeline Company of America ("Natural"). Following a settlement agreed to by all parties and approved by the Commission, Mitchell was authorized to collect a rate in excess of the area rate and, in return, Mitchell was obligated to undertake extensive exploration

[2]Opinion No. 607, Opinion and Order Determining Just and Reasonable Rates For Natural Gas Produced in the Other Southwest Area, 46 FPC 900 (1971), on rehearing, Opinion No. 607-A, 47 FPC 99 (1972), *aff'd*, Shell Oil Co. V. FPC, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom* Mobil Oil Corp. v. FPC, 417 U.S. 973 (1974).

and development activities in the Wise County Area and elsewhwere.[3]

On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for further proceedings, citing the Commission's failure to consider any evidence of Mitchell's costs or profits compared with the costs and profits of other producers in the area.[4]

At the hearing on remand, Mitchell presented cost evidence in the evidentiary format traditionally used by the Commission with the concurrence of the Commission Staff and all parties. The evidence demonstrated that Mitchell's individual costs exceeded both the OSWA rate as well as the rate authorized by the Commission in Opinion No. 649.

Less than two months after the issuance of Opinion No. 649, the Commission recognized the inadequacy of the existing area rates and instituted rulemaking proceedings to

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[3]Opinion No. 649, Opinion and Order Granting Special Relief and Terminating Proceedings, 49 FPC 424 (1973). Opinion No. 649, required Mitchell to drill 125 additional wells in the Wise County Area, expend $16.5 million on a nationwide exploration and development program, expend $2 million for the installation of additional compression facilities in Wise County, and offer Natural a preferential right to purchase all the gas which was discovered within 25 (later 40) miles of any of Natural's pipelines within the State of Texas. Opinion No. 649,49 FPC 424 (1973). Mitchell fulfilled its obligations under the Settlement Agreement by completing the 125 wells and installing the additional compression facilities in Wise County and spending over $25 million on nationwide exploration and development during this period.

[4]Macdonald v. FPC, 505 F.2d 355 (D.C. Cir. 1974), *cert. denied sub nom.* George Mitchell & Associates v. Macdonald, 421 U.S. 912 (1975).

Mitchell later filed an amendment to its contract with Natural in conjunction with a proposed rate increase which would enable Mitchell to collect the nationwide rate established in Opinion No. 699-H, 52 FPC 1604 (1973), for new gas produced from wells which Mitchell drilled in the Wise County Area after April 1, 1974. The Commission rejected this proposed rate increase on the grounds that it was in conflict with Opinion No. 649, Mitchell Energy Corp., Order Accepting Proposed Increased Rate, in Part, and, Rejecting It, in Part, And Accepting Contract Amendment for Filing, 52 FPC 982 (1974), *rehearing denied*, 52 FPC 1769 (1974). The Fifth Circuit affirmed the Commission's decision in Mitchell Energy Corp v. FPC, 519 F.2d 36 (5th Cir. 1975), on the grounds that the proposed rate increase was in conflict with the terms of the Mitchell-Natural Settlement.

set higher nationwide rates for both old and new gas based on more current cost data. Opinion Nos. 699[5] and 749[6] established national rates for certain categories of natural gas production which were applicable to certain portions of the production for which special relief had been sought. Mitchell requested Commission approval of the withdrawal of its petition for special relief, which was granted May 20, 1976. The Commission order approved a new agreement between Mitchell and Natural which permitted Mitchell to collect the prevailing national rates for old and new gas conditioned upon Mitchell's completion of the drilling program and expansion of its commitment to Natural.[7] The

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[5]Opinion No. 699, Just and Reasonable National Rates for Sale of Natural Gas from Wells Commencing On or After January 1, 1973, and New Dedication of Natural Gas to Interstate Commerce On or After January 1, 1973, 51 FPC 2212 (1974), *rehearing denied*, Opinion No. 699-H, 52 FPC 1604 (1974), *aff'd sub nom.* Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1261, *cert. denied sub nom.* The California Company v. FPC 426 U.S. 941 (1976). The national base price of 43¢ per Mcf originally set in Opinion No. 699 was raised to 52¢ per Mcf in Opinion No. 699-H, 52 FPC at 1649. The national rates were authorized by Opinion Nos. 749 and 699-H as of April 20, 1976.

[6]Opinion No. 749, Just and Reasonable National Rates for Sales of Natural Gas from Wells Commenced Prior to January 1, 1973 (Dec. 31, 1975), as amended by Opinion No. 749-C (July 19, 1976), *aff'd in part, rev'd in part*, Tenneco Oil Co. v. FERC, 571 F.2d 834 (5th Cir. 1978), *cert. denied*, 439 U.S. 801 (1979). By the terms of this Opinion, the national rate for flowing gas increased to 29.5¢ per Mcf on July 1, 1976.

[7]Mitchell Energy Corporation, Docket No. RI73-60, Order Permitting Withdrawal of Petition for Special Relief and Setting Hearing on Issue of Refunds (May 20, 1976). By the terms of this Order, the Commission placed great weight on the recommitment by Mitchell, not only to complete the remaining 88 wells under the original 125 well drilling program, but also to extend Natural's preferential right to purchase new gas developed anywhere in Texas within 40 miles of Natural's facilities, as opposed to the previous 25 mile corridor on either side of Natural's pipeline.

An application for rehearing of the May 20, 1976 order was filed by the American Public Gas Association (APGA), requesting that Mitchell not be permitted to introduce cost evidence and alleging that Mitchell must be required to make full refunds. The Commission denied the Application on July 20, 1976, restating that the parties should be able to develop a record on the facts, law, and equities.

order also set for hearing the issue of Mitchell's obligation to refund any of the amounts which it had collected under the special relief order during the "locked-in" period prior to the withdrawal of the petition for special relief.[8] The order specifically provided that "[b]y setting the refund question for hearing we will permit the parties to develop a record of the facts, law, and equities involved in any refund decision." Mitchell provided additional evidence of its cost-of-service and expanded exploration and development activities in the Wise County Area during this "locked-in" period. Natural presented evidence of the additional natural gas supplies received by its interstate customers. No other party presented any evidence. The record demonstrated that Mitchell's cost-of-service in the Wise County Area during the locked-in period exceeded both the OSWA and Opinion No. 649 rates.

Mitchell's Petition for Special Relief and the record also showed that Mitchell's undertaking of the expanded exploration and development program in the Wise County Area was predicated upon receipt of the special relief rate and would not otherwise have been undertaken.

In Opinion No. 649-B, issued on July 19, 1977, the Commission ordered Mitchell to refund all amounts collected in excess of the OSWA rate.

Mitchell's application for rehearing of Opinion No. 649-B was denied by the Commission on September 15, 1977. On appeal, the Fifth Circuit in *Mitchell Energy Corporation v. FERC*,[9] vacated and remanded Opinion No. 649-B to the Commission for further proceedings. The Court ruled that the Commission had erroneously used the evidentiary standard set forth in *Macdonald* in a refund proceeding. It directed the Commission on remand to either utilize "the evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined" to ascertain

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[8] *I.e.*, the period from February 21, 1973 (the date of Opinion No. 649) through April 20, 1976.

[9] 580 F.2d 763 (5th Cir. 1978).

whether Mitchell had any refund obligation or "explain the reason" for departure from these standards.[10] In doing so, the Fifth Circuit noted that Mitchell had already prepared and submitted cost evidence in the expectation that the usual standards would be applied.

On remand, the Commission ignored the Fifth Circuit's mandate. Without conducting any further hearings and without making any new substantive findings, it ordered Mitchell to refund the same amount which it had ordered Mitchell to refund in Opinion No. 649-B.[11] The Commission merely restated its earlier finding that the just and reasonable rate for the gas in question is the OSWA rate. Although acknowledging that it was ordinarily appropriate to consider an individual producer's costs in a refund proceeding, the Commission ignored Mitchell's cost evidence and concluded, contrary to its earlier position, that "the question of whether Mitchell's cost of production from the Wise County wells during the locked-in period exceeded revenues from these wells ... is irrelevant to this proceeding."[12] The Commission claimed that such consideration "would be contrary to the ordinary method of determining just and reasonable rates and refund liability."[13] It is this order which is under review in this case.

Mitchell's application for rehearing was denied by the Commission on October 7, 1980. Mitchell appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the Commission's order. The Court's decision concluded that the Commission acted within its discretion in (1) refusing to consider Mitchell's individual costs and (2) requiring refunds solely on the finding that the rate collected exceeded the OSWA rate which would have been applicable had no petition for special relief been filed. The Court's decision was based on three rationales: First, failure to

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[10]*Id.* at 765.

[11]Order Determining Refund Obligation on Remand and Ordering Refunds, Docket No. R173-60 (August 8, 1980). App. pp. A10-A19.

[12]App. p. A15.

[13]App. p. A15.

impose a refund obligation would result in Mitchell obtaining dual benefits, the benefits of the special relief rates and the benefits of the national rates. Second, individual cost-of-service was not the applicable standard for determining any refund obligation. Third, if the Commission had departed from the applicable standard, it had adequately explained its deviation.[14]

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Sanctions a Refund Standard Which Contravenes the Established Principle of Rate Regulation and Is Constitutionally Unsound

This case presents a question which is unusual, but not so unique that its reoccurrence is unlikely. Rates based on average producer costs have been approved as permissible under the Constitution and the Natural Gas Act where an opportunity exists either to withdraw from the regulated activity or to seek special relief from the group rates. In *re Permian Basin Area Rate Cases*, 390 U.S. 747,772 (1968). As this Court noted with approval in *Federal Energy Regulatory Commission v. Pennzoil Producing Company*, 439 U.S. 508, 515-16 (1979), it is the Commission's policy that departures from area rates are permissible if "a producer can show that its costs exceed its revenues at the area rate."

Mitchell does not challenge the validity of area rates. It challenges the application of area rates to a situation where the Commission granted authority to implement higher rates in an exchange for a commitment by an independent producer to incur higher costs. The decision below erroneously rests on the conclusion that withdrawal of Mitchell's special relief petition was properly construed as an agreement that all collections in excess of the area rate should be refunded even though the collections were fully justified by costs incurred in a drilling program that (a) had been authorized by the Commission, and (b) which would not have been performed absent the above-ceiling rates.

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[14]App. pp. A7-A9.

This position ignores the fact that reliance on an order permitting the collection of higher rates, even though the special relief petition has not achieved final, non-appealable staus is possible. The issue presented here is, once an independent producer has lawfully collected higher rates and incurred higher than average costs in undertaking a successful and extraordinary exploration program imposed by regulatory authorization, may the Commission refuse to consider those individual costs when determining whether a refund is due.

The issue is one of first impression to this court. The need for a definitive resolution is critical. Despite the passage of the Natural Gas Policy Act of 1978 (the "NGPA")[15] much of the gas presently sold to interstate pipelines remains subject to price regulation under the Natural Gas Act. Moreover, because § 502(c) of the NGPA provides for a procedure for adjustment to the generally applicable rates prescribed therein, it is conceivable that a similar question could arise under the administration of that Act by the Commission. The need to fashion special relief is a recurring eventuality. Despite well-established precedent that costs are critical to refund liability, the Court below has sanctioned a rule concluding that the Commission can authorize collection of above-ceiling rates on the basis that special costs must be incurred, and then ignore such costs in a subsequent proceeding. The ruling can only create uncertainty among companies contemplating special programs, producing an obstacle to informed economic decisions plainly inimical to the public interest. Therefore, the court needs to enunciate the proper standard for determining liability for refund in the circumstances raised by this proceeding. While this unresolved question has bearing on any system of economic regulation based on average cost, it remains particularly significant to natural gas regulation.

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[15]15 U.S.C. § 3301 *et. seq.* (Supp. III 1979).

A. The Decision Below is Inconsistent With the Rationale of Prior Decisions

1. Costs Must Be Considered in Refund Decisions

A regulated entity's liability for refunds cannot be divorced from the question of its costs. This Court has long required that the revenues collected must be sufficient to recover costs. Rates which fail to yield a reasonable return to the equity owner are confiscatory and as such deprive the owner of property in violation of the Constitution.[16] In *FPC v. Hope*, 320 U.S. 591, 603 (1944), the Court acknowledged that "it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." *Id.* at 603. Therefore, rates which do not allow the company to recover its operating expenses must be considered confiscatory.

From the inception of price regulation of the interstate sales of natural gas by independent producers, this Court has noted that it is inappropriate to impose refund obligations in situations where the producer can demonstrate through its cost evidence that its cost-of-service exceeded the revenues which is collected. In *Wisconsin v. FPC*, 373 U.S. 294, 306 (1963), this Court concluded:

> Having decided on the basis of substantial evidence that increases did not bring revenues up to cost of service, the Commission properly concluded ... that no refund obligation could be imposed.

In *City of Chicago v. FPC*, 458 F.2d 731, 734 (D.C. Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), the D.C. Circuit traced the development of the "just and reasonable" concept, noting the initial reliance on producer costs in assessing gas rates. The Court interpreted *City of Detroit*, 230 F.2d 810 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 825 (1956) as indicating that the

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[16]Bluefield Waterworks & Improvement Co. v. Public Service Comm'n, 262 U.S. 679, 690 (1923).

conventional cost-based rate method provides the best test of rate fairness. In so stating, the Court wrote:

> In most circumstances ... costs provide a framework within which non-cost factors can be considered and it is this framework which normally gives the terms "just and reasonable" some meaning from the standpoint of the consumer.[17]

The critical issue in this proceeding is to ascertain under what circumstances the Commission is required to examine individual costs to establish just and reasonable rates and liability for refunds. The Commission has a statutory duty to permit independent natural gas producers to recover their costs-of-service and a reasonable return on their investment.[18] No theory of administrative practicality can support the refusal to consider individual costs where the Commission granted authority to implement higher rates in exchange for a commitment to incur higher costs.

Where maximum rates based on average costs are imposed prospectively, independent producers evaluate the economics and select an exploration program based on that limitation. In the present case Mitchell did not make economic decisions based on the OSWA rates. Instead, because it had been granted special rate relief, Mitchell incurred costs which could only be recovered at the higher rate approved by the Commission. Where costs have been incurred on the reasonable expectation of all parties that rates commensurate with those costs can be collected, it is unfair and arbitrary to impose a refund based on an area rate. Therefore, area rates should not be regarded as an unassailable determination of the justness and reasonableness in a case in which the Commission has specifically authorized the collection of a rate in excess of the area rates. Where an individual special rate has been

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[17]458 F.2d at 751 n.86.

[18]FPC v. Texaco, 417 U.S. 380, 387 (1974); *cf.* FPC v. United Gas Pipe Line Co., 386 U.S. 237 (1967); FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 153 (1962).

authorized, an opportunity must be presented to demonstrate the costs supporting the justness and reasonableness of that rate.

The decision below violates this principle. Moreover, it contradicts the rule of other circuits[19] and the 1978 decision of the Fifth Circuit in this case.[20]

2. Equity Compels the Consideration of Individual Circumstances

The principal standard by which refund obligations ordinarily are determined requires a two-stage analysis. Initially, there must be a determination of whether the costs which the independent producer experienced exceed the revenues which it collected. If the determination is made that excess revenues were collected, then the Commission must consider whether any equitable considerations justify the collection. In this second stage, any refund obligation must be based on the individual circumstances of the party before the Commission. The analysis of such factors must be exhaustive and particularized. *FPC v. Sunray DX Oil Company*, 391 U.S. 9, 23-24 (1968), represents an application of this principle, stressing the factor of a producer's reliance on the authorization to collect a rate different than the ultimately determined area rate. In *Consumer Federation of America*, the D.C. Circuit noted that "not every decision invalidating an agency order is given full retroactive effect."[21] Rather, a full analysis of the facts in the particular case must be undertaken.

> [T]here are large questions of equity and public interests .... While full refund under an invalid

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[19]Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir.), *cert. denied*, 423 U.S. 906 (1975); Continental Oil Co. v. FPC, 378 F.2d 510 (5th Cir. 1967) *cert. denied sub nom.* Austral Oil Co., Inc. v. FPC, 391 U.S. 917 (1968); In re Hugoton-Anadarko Area Rate Case, 466 F.2d 974, 990-91 (9th Cir. 1972); Skelly Oil Co. v. FPC, 401 F.2d 726 (10th Cir. 1968).

[20]Mitchell Energy Corp. v. FERC, 580 F.2d 763 (5th Cir. 1978).

[21]515 F.2d at 359, citing Zuber v. Allen, 396 U.S. 168 (1969).

> order is a sound basic rule, *it may be offset*, at least in part, *by the lack of mechanism to restore the full status quo ante, the fact that consumers may have had the benefit of some increase in supply* that would not have been forthcoming under §7 procedures, albeit purchased at an excessive price, and the fact that some portion of the increased prices paid may be discerned as consistent with just and reasonable producer rates.[22]

The amounts of refunds are limited to the excess of the actual over the just and reasonable charges and may be even less since "the issue of refund in [such] circumstances turns upon equitable considerations." *Public Service Commission v. FPC*, 329 F.2d 242, 250 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil and Gas v. FPC*, 377 U.S. 969 (1964). In this instance, adherence to the principles of equity compels full consideration of the record evidence establishing (1) that benefits were received by the consumers, (2) that the rate was cost-justified, and (3) that it is impossible to restore Mitchell to the full *status quo ante*.

The standards under which a court is required to review the exercise of an agency's equitable power are well-established. In reviewing an order, a court must determine whether the agency decision is "equitable in the circumstances of this litigation."[23] The D.C. Circuit elaborated on this requirement in *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047-48 (footnoted omitted) (D.C. Cir. 1981), as follows:

> This stress upon "equitable considerations," indicates that, while the agency has a duty to consider the relevant factors in making a refund decision and enjoys a broad discretion in weighing those factors, the precise manner in which these general principles should be applied by a reviewing court depends upon, as is tradition in cases sounding in equity, the facts of the particular case.

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[22]*Id.* (emphasis added).

[23]Wisconsin Electric Power Company, 602 F.2d 452, 457 (D.C. Cir. 1979).

In footnote 14 to its decision, the D.C. Circuit stated its construction of how equity compels consideration of particular circumstances:

> ... [T]he discretion [of an equity court] is not the mere personal discretion of the chancellor or judge, but is a judicial discretion, which means that the judge consults precedents to find the principles, as distinguished from strict rules, which are applicable to a given situation, and then determines, from all of the facts in the case, what relief will best give effect to the various principals involved. H. McClintock, Handbook of the Principles of Equity 51-52 (1948).[24]

Reliance on particular rulings is a highly relevant individual circumstance. Where policies (in this case, Opinion No. 649) have created certain expectations, commitments, and resulting benefits, the courts have required that agencies give "due consideration to the equities ... arising out of commitments based on previous ruling."[25]

While appellate courts reviewing Commission refund determinations have indicated that certain factors should be considered by the Commission in its refund deliberations, the appellate courts have not offered an exhaustive list of factors to be considered by the Commission prior to the exercise of its refund authority. The appellate decisions regarding refund matters have clearly given the Commission the power to consider and weigh any facts which present a policy consideration for the regulation of the natural gas industry. The Fifth Circuit is most explicit in suggesting the breadth of the Commission's inquiry:

> ... [W]hen the power [to order refunds] is exercised it must be shown that all equitable considerations

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[24]*Id.* at n. 14.

[25]Consolidated Gas Supply Corporation v. FPC, 520 F.2d 1176, 1187 (D.C. Cir. 1975); City of Chicago v. FPC, 385 F.2d 629, 737 (D.C. Cir. 1967).

> involved have been explored and given due weight in the conclusion reached.[26]

In reviewing a party's obligation to refund collected rates, the Commission should consider the same factors presented in natural gas ratemaking proceedings. This Court's decision in *Mobil Oil Corp. v. FPC*, 417 U.S 283,320-21 (1974), is most instructive on this point. This Court explictly acknowledged that the Commission, in formulating its refund provisions, should seek to achieve precisely those goals which it strives to reach in promulgating new area rates:

> [t]he Court of Appeals could certainly conclude that the Commission might reasonably decide that, as compared with adjustments in the rate ceilings for gas producers to induce more exploration and production, its responsibility to maintain adequate supplies at the lowest reasonable rate could better be discharged by means of the contingent escalation and refund credit provisions.

In *State of California v. FPC*, 466 F.2d 974 (9th Cir. 1972), the court upheld a settlement under which refunds were limited by the Commission. The court approved the Commission's determination that no refunds would be required for the period from the time of a private settlement through December 31, 1960. Partial refunds (30% in excess of the settlement rate) were required for the next two years with full refunds thereafter. The court reasoned that it would be unfair to require full refunds from a company not party to the settlement which had relied on previous Commission policy regarding recovery of gathering costs. In noting the Commission's discretionary authority over refunds, the court stressed the need to assess the practical effects of requiring refunds.

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[26]Continental Oil Co. v. FPC, 378 F.2d at 532.

In *City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), the court upheld the Commission's determination that no refunds were required in a case where a natural gas supplier received favorable tax treatment permitting it higher profitability. The court stated that full retroactivity would not be required. It stressed the need to consider the equities arising from a producer's previous commitments based on earlier rulings. It stated that it would be inequitable to make a new policy effective before the industry could know that policy and anticipate the need for refunds. The court also stressed retroactivity might undermine a previous settlement.

These decisions compel the Commission to consider the policy implications of all factors before making a refund determination. The decision below sanctions a Commission assessment of equitable factors which violates this standard.

In this proceeding, the Commission failed to consider Mitchell's reliance on the special relief order. Mitchell has been deprived of its opportunity to avoid incurrence of costs that could not be recovered. Mitchell proposed a drilling program which would have been uneconomic at the prevailing OSWA rates and proposed a rate which would render the program economic. Mitchell received permission to implement that rate. After protracted and unsuccessful efforts to defend the rate, Mitchell withdrew its petition for special relief, accepted rates available to all producers,[27] and sought to justify the collection of that rate based upon evidence of its extraordinary costs in complying with Opinion No. 649 and the substantial benefits received by the interstate natural gas consumer.

Uncontroverted evidence established that Mitchell undertook substantial additional exploration and development efforts involving major expenditures of capital which would not have been made absent the Opinion No. 649 rate. These efforts inured to the benefit of interstate customers, and that, as a result, there is a lack of a mechanism

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[27]Mitchell had to make a contractual commitment to complete the extraordinary drilling program in order to obtain Natural's agreement and the Commission's authorization to implement the higher rates.

to restore Mitchell to the *status quo ante*. Neither the Commission nor the court has addressed the issue.

Mitchell satisfied its obligations under Opinion No. 649 and its contract with Natural. Because the *Macdonald* court did not reverse Opinion No. 649 nor abrogate the terms of Mitchell's contract with Natural; Mitchell's obligations remained unchanged. As noted in *ECEE, Inc. v. FPC*, 526 F.2d 1270 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976).

> [An FPC Order] is final *unless and until* it is stayed, modified, or reversed .... In the absence of a stay, the FPC's orders are entitled to have administrative operation and effect during the disposition of the proceedings.[28]

No party sought nor did the Commission issue any order staying or modifying the rates approved in Opinion No. 649 until the petition for special relief was withdrawn in May 1976.

A prudent investor would not incur costs that could not be recouped without an opportunity to receive compensatory rates. Yet the Commission has ordered, and the Fifth Circuit has concurred, that Mitchell's good faith reliance on the Commission order that it believed would provide for recovery of extraordinary costs can be ignored.

B. The Decision Below Is Constitutionally Defective In Its Sanction of an Unlawful Taking of Private Property

In granting the special relief rate, the Commission authorized Mitchell to incur and recover the exceptional costs related to the extraordinary drilling program.

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[28] 526 F.2d at 1274 (emphasis in original). *See also* Jupiter Corp. v. FPC, 424. F.2d 783, 791 (D.C. Cir. 1969), *cert. denied*, 397 U.D. 937 (1970); Dyer v. SEC, 289 F.2d 242, 244 (8th Cir. 1961).

The record below contains detailed cost evidence establishing the cost-of-service associated with natural gas production from its Wise County wells during the locked-in period. The following table summarizes Mitchell's cost evidence, excluding a return component, for each of the years from 1972 through 1975.

Summary of Mitchell's Cost Evidence (Cost per Mcf)
(Table Excludes Return Component)

	1972	1973	1974	1975
EXHIBIT 14 - Average Unit Cost of Service for Well Sample				
Direct & Indirect Expense	5.84¢	6.84¢	9.58¢	11.06¢
DD&A*	5.77	5.96	6.62	6.76
E&D Expense**	10.38	24.56	33.31	22.81
Production Tax***	1.39	2.25	2.25	2.25
TOTAL	23.38¢	39.61¢	51.76¢	42.88¢

EXHIBIT 19 - Actual Unit Cost of Service for Well Sample	
Direct & Indirect Expense	2.40¢
DD&A*	6.05
E&D Expense**	28.82
Production Tax ***	2.25
TOTAL	49.52¢

EXHIBIT 20 - Average Unit Cost of Service Using Costs from Well Sample Only and Total Wise County Production

	1973	1974	1975
Direct & Indirect Expense	3.34¢	5.73¢	6.93¢
DD&A*	3.21	3.55	2.95
E&D Expense**	24.56	33.13	28.82
Production Tax***	2.25	2.25	2.25
TOTAL	33.52¢	44.66¢	40.95¢

EXHIBIT 21 - Average Unit Cost of Service Using Total Costs and Production From All Wells in the Wise County Area in Which Mitchell Has an Interest

Direct & Indirect Expense	6.72¢	10.49¢	12.80¢
DD&A*	4.76	4.94	4.99
E&D Expense**	24.56	33.13	28.82
Production Tax***	2.25	2.25	2.25
TOTAL	38.29¢	50.81¢	48.86¢

* Depreciation, Depletion and Amortization Expense.

** Exploration and Development Expense.

*** In accordance with generally accepted procedures, production taxes were computed at 7.5% of the rate collected (i.e., 18.53¢ in 1972 and 30.00¢ in 1973-75).

A reasoned analysis of the cost data in the record leads inexorably to the conclusion that Mitchell's cost-of-service in the Wise County Area during the locked-in period exceeded not only the OSWA rate of 18.5¢ per Mcf but also the Opinion No. 649 rate of 30.25¢ per Mcf. However, both the Commission and the Fifth Circuit disregarded this evidence.

C. The Decision Below Affirms an Arbitrary Standard Incompatible with Basic Concepts of Equity.

Despite uncontroverted evidence of the benefits to Natural and its interstate natural gas customers and Mitchell's justified reliance on the Commission order, the Commission has consistently refused to consider waiver of refunds on equitable grounds. Instead, the Commission asserts that refund obligations are necessary to restore the *status quo ante*. This conclusion is wholly at odds with the facts. The record establishes that, absent Opinion No. 649, Mitchell would not have undertaken a drilling program of such magnitude in the Wise County Area, nor installed additional compression facilities, nor provided Natural with such preferential rights to purchased natural gas to be produced throughout Texas. Rather, Mitchell would have allocated its capital funds to endeavors which would have been profitable.

The Fifth Circuit's decision suggests that Mitchell received a benefit from the special relief settlement rate which should be returned once its petition for special relief was withdrawn. However, the decision wholly ignores the fact that the special relief rate was allowed as a *quid pro quo* for a drilling obligation undertaken and performed by Mitchell. In footnote 11, the Court notes that Mitchell had not completed its 125-well drilling program at the time that it withdrew its petition for special relief and thus was not "entitled" to the benefits of the program. This argument fails for two reasons.

First, Mitchell does not seek a determination that individual cost must be considered before an area rate can be imposed. All Mitchell seeks is an opportunity to have its individual costs examined before any refund obligation is determined. Mitchell's individual costs are highly relevant. The amounts collected in excess of the area rate were authorized because the Commission recognized that the area rates were inadequate to justify the additional expense necessary to undertake the drilling program. The Commission has never denied the fact that Mitchell's cost evidence conformed to a format frequently employed by the Commission in rate-making proceedings. The Commission does not deny that the evidence below would justify the rate collected. Instead, the Commission simply refused to consider Mitchell's individual costs.

Second, Mitchell completed the agreed-upon drilling program. It also expanded Natural's contractual right to purchase natural gas discovered and developed by the drilling program when Natural agreed to pay the new national rate. The assumption of these additional contractual obligations demonstrates that Mitchell did not obtain the benefits of that new rate simply by withdrawing its petition for special relief. Instead, Mitchell obtained the "benefits" of national rates only by increasing its obligation to Natural, a burden that was not imposed on any other producer who became eligible to collect the national rates.

II. This Court Should Review the Decision Below Because it is Not Supported by Substantial Evidence

A court reviewing an order of the Commission under the Natural Gas Act must determine the order is supported by substantial evidence in the record. *FPC v. Texaco*, 417 U.S. 380 (1974); *Mobil Oil Corporation v. FPC*, 417 U.S. 283 (1974); *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The decision below fails to pass muster because several of the findings reached by the Commission and adopted by the Fifth Circuit are not supported by any evidence whatsoever.

The validity of the substantial evidence rule is particularly endangered in the present case, where the agency has achieved the same result on remand that it had originally, and without any further evidentiary proceedings. The D.C. Circuit holds that "[a] reviewing court will accord a somewhat greater degree of scrutiny to an order that arrives at substantially the same conclusion as an order previously remanded by the same court." *Greyhound Corporation v. ICC*, No. 80-1271 (D.C. Cir. Nov. 6, 1981). *See also Food Marketing Institute v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978), wherein it is stated, "[w]e must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues."

The Fifth Circuit has erroneously sustained the Commission's reiteration of its earlier findings that applying the OSWA rates returns Mitchell to the *status quo ante* and that to excuse Mitchell from any refund obligation would give it "dual benefits."

The Fifth Circuit's decision rests on the conclusionary observation that the Commission has adequately justified and explained any variation from normal evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined. The only explanation of this conclusion proferred in the decision appears at footnote 11, wherein the court concludes that Mitchell somehow obtained an undeserved benefit because it had drilled only 44 of the first 125 wells it was committed to drill during the first two-thirds of the commital period.[29] The Court ignores the fact that Mitchell drilled the remainder of the wells as required and within the required time frame. The decision also ignores the substantial benefits received by interstate consumers. Moreover, the Court's decision intimates that Mitchell somehow received an inappropriate benefit from its collection of national rates subsequent to the withdrawal of its petition for special relief. No such benefit

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[29]App. p. A8.

was obtained.[30] The determinative question here is whether refunds should be required.

The Commission recognized that this was the task before it because its order rests on the contention that it can return Mitchell to the *status quo ante* for the locked-in period by approving the OSWA rate for that period. The uncontested evidence below shows Mitchell would never have drilled the developmental wells during that locked-in period had it not been for the availability of the special relief rate. Consequently, limiting Mitchell's recovery to the OSWA rate precludes returning Mitchell to the *status quo ante* since the Commission has no means of returning to Mitchell the opportunity to have its capital funds expended in alternative business opportunities.

When the "benefit" and *status quo ante* rationales are cast aside because they lacked any factual foundation, it is clear that the Commission's efforts to justify its departure from the normal evidentiary standard and to balance the equities are conclusory statements. The lack of any evidentiary support for the Commission's findings are a fatal defect and the unfounded reliance thereon by the Fifth Circuit is improper in light of the requirements that an agency's decision be supported by substantial evidence before it can be affirmed by a reviewing court.

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[30]Mitchell's ability to collect the national rate for the remaining wells was conditioned on its contractual agreement to expand Natural's purchase right and the completion of its drilling program. It is also incorrect to describe the collection of national rates as a "benefit." The characterization infers that Mitchell was somehow granted preferential treatment when in fact the national rate was available to all producers having contractual authorization, and was adopted because the Commission recognized the inadequacy of its prior area rate order.

CONCLUSION

The precedent established by the decision below conflicts with the rationale of previous decisions issued by this Court and the United States Court of Appeals for the D.C. Circuit. Previous cases have required that individual cost evidence should be considered in a refund proceeding. Previous decisions have held that individual circumstances must be considered in weighing the equities involved in a refund proceeding. Previous judicial precedents have held that reviewing courts cannot uphold an agency's decision without substantial evidence in the record to support the agency's findings. Because the decision below conflicts with these principles, the Court should review this case.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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Appendix

APPENDIX A

MITCHELL ENERGY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 80-2304.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Dec. 3, 1981.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before CHARLES CLARK, GARZA and SAM D. JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

Mitchell Energy Corporation petitions for review of an order of the Federal Energy Regulatory Commission[1] directing Mitchell to refund more than $9 million allegedly collected in excess of legally authorized rates. This is the fourth time that a circuit court has been asked to review a Commission order arising from the facts of this case. Most recently, in *Mitchell Energy Corporation v. FERC*, 580 F.2d 763 (5th Cir. 1978) (hereinafter *Mitchell I*), this court reviewed a simliar refund order of the Commission and found it necessary to remand the case back to that agency for further proceedings where the Commission had improperly used evidentiary standards applicable to a special rate case. We now review the Commission's order promulgated following remand and conclude that the Commission acted within its

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

[1]The Federal Energy Regulatory Commission (FERC) assumed most of the duties of the Federal Power Commission on October 1, 1977. In this opinion, the term "Commission" refers to either FERC or its predecessor agency, whichever was active during the time period referenced.

discretion in ordering and computing Mitchell's refund obligation and that such was adequately explained and justified in the Commission's order of August 8, 1980.

FACTS

This proceeding began in August, 1972, when Mitchell, a producer of natural gas, filed a petition seeking special relief from applicable area rates established in Opinion No. 607, Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in Other Southwest Area (OSWA rates), 46 FPC 900 (1971), *on rehearing*, Opinion No. 607-A, 47 FPC 99 (1972), *aff'd sub nom., Shell Oil Co. v. FPC*, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom., Mobil Oil Corp. v. FPC*, 417 U.S. 973, 94 S.Ct. 3180, 41 L.Ed.2d 1144 (1974). In its petition, Mitchell sought to increase its rates charged for natural gas sales from its Boonesville Bend Field in Wise County, Texas from a "weighted average" rate of 18.859 cents per Mcf to 30.25 cents per Mcf.[2] Hearings on the petition for special relief were halted by a settlement agreement, approved by all parties, which was adopted by the Commission in Opinion No. 649, Opinion and Order Granting Special Relief and Terminating Proceedings, 49 FPC 424 (1973). The settlement agreement provided Mitchell with the higher rate it sought in its petition in exchange for its agreement to drill at least 125 additional wells in the Wise County area and expend some $16.5 million in the United States on various drilling activities. The settlement agreement further provided that every five years, beginning in 1977, there would be an automatic price increase of 1 cent per Mcf and a redetermination of the 30 cent base rate.

Intervenors sought review of the order granting special relief in the United States Court of Appeals for the District of Columbia Circuit, and the case was remanded for consideration of additional evidence concerning Mitchell's costs and profits under the special rate. *MacDonald v. FPC*,

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[2]This weighted average was based on the area rate of 18.7 cents for flowing gas and 24 cents for new gas as established in the OSWA rate proceeding, Opinion Nos. 607 and 607-A, *supra*. The term "Mcf" refers to "thousand cubic feet"—the standard unit of measure for gas sales.

505 F.2d 355 (D.C.Cir. 1974). Following the remand and while the Commission was considering Mitchell's cost evidence with respect to the special relief issues, Opinion Nos. 699 [3] and 749 [4] were issued by the Commission. These opinions increased the prevailing area rates for new gas and flowing gas to 50 cents per Mcf and 23.5 cents per Mcf, respectively. Because the area and national rates now exceeded the special relief proceeding, Mitchell requested the Commission to permit it to withdraw its petition for special relief and effectuate the area rate which was applicable nationwide to producers of similar natural gas.[5] The

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[3]Opinion No. 699, Just and Reasonable National Rates For Sales of Natural Gas, 51 FPC 2212 *rehearing denied*, Opinion No. 699-H, 52 FPC 1604 (1974), *aff'd sub nom., Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1261 (5th Cir.), *cert. denied sub nom., The California Co. v. FPC*, 426 U.S. 941, 96 S.Ct. 2661, 49 L.Ed.2d 394 (1976).

[4]Opinion No. 749, Just and Reasonable National Rates For Sales Of Natural Gas In Wells Commenced Prior to January 1, 1973, 54 F.P.C. 3090 (1975), *on rehearing*, Opinion No. 749-C (1976), *affirmed in part and set aside in part sub nom., Tenneco Oil Co. v. FERC*, 571 F.2d 834 (5th Cir. 1978), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 43, 58 L.Ed.2d 94 (1979).

[5]Prior to withdrawing its special relief request, Mitchell attemtped to incorporate the new national rates into its rate schedule. In the settlement adopted by Opinion No. 649 granting special relief, the contract for purchase of natural gas between Mitchell and Natural Gas Pipeline Company, Mitchell's principle buyer, was incorporated. This conract permitted Mitchell to charge Natural 30.25 cents per Mcf for all gas sold to Natural. Following the issuance of Opinion 699 which raised the rate of new gas above that which Mitchell was receiving under the special rate, Mitchell amended its agreement with Natural to permit it to charge the higher of the special rate or national rate. Shortly thereafter, Mitchell filed a rate increase with the Commission to permit it to charge the national rate. The Commission accepted the proposed rate increase, but only with respect to Mitchell's interests not covered by Opinion No. 649. The Commission reasoned that Mitchell was not entitled to a rate higher than the settlement rate for new gas while it continued to enjoy the benefits of the settlement with respect to the flowing gas. Mitchell Energy Corporation, Order Accepting Proposed Increased Rate, In Part, and Rejecting It, In Part, And Accepting Contract Amendment For Filing, 52 FPC 982 *rehearing denied*, 52 FPC 1769 (1974). This Court affirmed the Commission interpreting the settlement agreement to preclude any

Commission granted Mitchell's request,[6] but set for hearing the question of Mitchell's obligation, if any, to refund amounts collected pursuant to the special relief granted by Opinion No. 649.

At the hearing on the refund question, the ALJ used evidentiary standards proposed in *MacDonald* (the prior special rate case) to determine if Mitchell was entitled to charge the 30.25 cent rate authorized in Opinion 649 or was obligated to refund any amount in excess of a just and reasonable rate. The ALJ concluded that Mitchell should refund all amounts collected pursuant to the special relief order in excess of amounts Mitchell could have collected absent the special relief order. The Commission adopted the conclusion of the ALJ and denied rehearing.

On appeal, this Court found that the Commission had "erred in treating the evidentiary requirements set out in *MacDonald* as controlling" and remanded the case. *Mitchell I, supra.*

Upon remand, the Commission provided the parties further opportunity to comment on "the appropriate steps to be taken by the Commission in light of the opinion of the Fifth Circuit." Mitchell responded requesting a hearing in the event the Commission decided to apply an evidentiary standard other than the one proposed by Mitchell requiring examination of Mitchell's individual costs. On August 8, 1980, the Commission ordered Mitchell to refund all amounts collected under the special rates which exceeded the

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adjustment in a base rate until 1977, when the contract called for redetermination of the base rate. The court also stated,

> Mitchell's alternatives prior to 1977 are to waive entirely its own special relief or abide by the terms of its settlement and wait until 1977 to negotiate the contractual price.

Mitchell Energy Corporation v. FPC, 519 F.2d 36, 43 (5th Cir. 1975). The Commission relies in part upon this statement as authority for its finding that Mitchell was entitled to either special rate treatment or area rate treatment, but not the best of both.

[6]Mitchell Energy Corporation, Docket No. RI73-60, Order Permitting Withdrawal of Petition for Special Relief and Setting Hearing on Issue of Refunds (May 20, 1976).

appropriate area and national rate applicable during the "locked-in" period.[7] From an order denying rehearing, Mitchell appeals to this Court.

ISSUES

Mitchell raises three primary contentions, the first two of which concern the Commission's decision to order refunds and the third which concerns the Commission's computation of the refund obligation. First, Mitchell contends that the Commission erred in failing to follow this Court's mandate in *Mitchell I* because it refused to consider Mitchell's actual costs of production in determining if a refund was due. Second, Mitchell argues that the Commission abused its discretion by failing to give due weight to the equitable factors in this case which compel the waiver of any refund obligation. Finally, Mitchell contends that the Commission erred in refusing to adopt 23.5 cents per Mcf as a refund floor for the purpose of computing the extent of Mitchell's refund obligation.

THE REFUND OBLIGATION

Mitchell's first contention is based upon their reading of this court's previous decision in *Mitchell I*. A true reading of that case, however, reveals that the court was primarily concerned with the ALJ's use of the *MacDonald* special relief standards to determine if Mitchell's charges had been just and reasonable when "ordinar[y]" evidentiary standards for determining just and reasonable rates were applicable.[8] In

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[7]Mitchell Energy Corporation, Docket No. RI73-60, Order Determining Refund Obligation on Remand and Ordering Refunds (August 8, 1980). "Locked-in" period refers to the period between February 21, 1973 and April 20, 1976 during which Mitchell collected the special relief rates.

[8]The relevant portion of the Court's opinion is as follows:

> FERC erred in treating the evidentiary requirements set out in *MacDonald* as controlling in this refund determination case. The court in *MacDonald* concluded that the special relief order was not supported by substantial evidence and addressed the nature of evidence necessary to substantiate special rate relief. The present proceeding is to determine

Mitchell I the court, without stating the particular standards, remanded the case to the Commission to apply "evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined." 580 F.2d at 765 (5th Cir. 1978). The Commission interpreted the court's order to require them to apply the just and reasonable area rate in effect during the locked-in period to determine Mitchell's refund obligation. Mitchell read the order to require the Commission to consider their individual cost evidence or "explain the reason for its departure." Under either reading of the court's order, however, we find that the Commission was within its discretion to order Mitchell to refund the excess over the just and reasonable area rates it received under the special pricing request it chose to withdraw. Furthermore, the reasons set forth in the Commission's order indicate that the Commission did not abuse its discretion in considering the equitable factors which Mitchell contends compel the waiver of any refund obligation.

As the Commission stated in its order and as the facts of this case reveal, Mitchell, in 1972, on its own initiative, applied to the Commission seeking special relief from the OSWA rates applicable to natural gas producers. It entered into an

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whether Mitchell collected amounts in excess of just and reasonable rates, and if so how much, and whether Mitchell should be required to refund any or all of any excess. Nothing in *Macdonald* itself supports the conclusion by the ALJ, adopted by FERC, that the *MacDonald* evidentiary standards for special rate relief "must be controlling" as a plenary rule of evidence in this refund case.

FERC's interpretation of MacDonald as controlling led it to depart from the evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined. An agency must either conform itself to its prior decisions or explain the reason for its departure. (citations ommitted) The reasons given in this instance are not acceptable. This conclusion makes it unnecessary for us to consider Mitchell's argument that it was deprived of due process because the ALJ applied the *MacDonald* standards only after Mitchell, in the expectation that usual standards for refund cases would be applied, had prepared and submitted its evidence.

Mitchell Energy Corp. v. FERC, 580 F.2d at 765.

agreement in which it pledged to perform certain drilling activities, and accordingly, the Commission granted Mitchell the special relief which permitted it to charge higher prices for its gas than other producers. After area and national rates increased and the agreement granting special relief was no longer economical to Mitchell, and before Mitchell had completed the drilling activities it undertook to perform, it sought to escape from the agreement. In order to do so, Mitchell voluntarily withdrew its petition for special relief whereupon it was then permitted to charge higher rates under the newly established area and national rates. Because Mitchell chose to withdraw its special rate request, the Commission elected to treat Mitchell as it had treated other Southwest area producers; the Commission permitted Mitchell to receive the same revenues it would have received had it been charging the just and reasonable area rates which other Southwest area producers were permitted to charge during the locked-in period. The Commission stated in its order that "[a] producer's refund obligation is ordinarily the difference between the rate collected and the applicable just and reasonable rate." In this case, Mitchell was ordered to refund the difference between the special rate it charged and the just and reasonable area or national rate it could have charged had it never applied for special relief.

To excuse Mitchell from any refund obligation would permit it to obtain "dual" benefits. Mitchell would receive the benefit of the special relief settlement rate when such rate exceeded the OSWA rate and, when the OSWA rate surpassed the special relief rate, Mitchell could abrogate its special relief settlement agreement and charge its customers according to the area rates. A similar "dual" benefit concept was rejected in part in *Mitchell Energy Corporation v. FPC*, 519 F.2d 36 (5th Cir. 1975).[9] Under these circumstances, it is apparent that the Commission was within its discretion to act

[9]See note 5, *supra*.

as it did. Whatever variation, if any,[10] by the Commission from the "evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined" was adequately justified and explained on remand.[11]

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[10]Mitchell argues that "the principal standard by which refund obligations ordinarily are determined is to ascertain whether the costs which the producer experienced exceeded the revenues which it collected." It cites several cases as explicit or implicit support for this principle; see *Wisconsin v. FPC*, 373 U.S. 294, 83 S.Ct. 1266, 10 L.Ed.2d 357 (1963); *Consumer Federation of America v. FPC*, 515 F.2d 347 (D.C. Cir. 1975); *City of Chicago, Illinois v. FPC*, 458 F.2d 731 (D.C.Cir. 1971); *Pure Oil Co.*, 28 FPC 889 (1962); *Shell Oil Co.*, 28 FPC 257 (1962). These cases, however, are not analogous to the instant case. First, none of these cases involved a factual scenario similar to the present one, where a company collected revenues pursuant to a special rate request which it subsequently withdrew in order to collect higher national rates. Second, in those cases where refunds were in dispute, none of the producers whose rates were challenged were subject to area or national rate regulation during the period challenged; therefore, in determining refunds, it was only logical that individual cost evidence be considered. In this case, Mitchell was subject to area/national rate regulation and was thus required to either charge area rates or apply for special relief. Third, no case holds that individual cost-of-service must form the principal basis for determining refunds. Indeed, *Consumer Federation of America v. FPC*, *supra*, the case upon which Mitchell principally relies, recognizes that many factors may be considered in determining a refund and "arriving at an equitable conclusion." Finally, even if the Commission did vary from the "standards by which just and reasonable rates and refund obligations ordinarily are determined," we find that the Commission adequately explained and justified its decision in its order of August 8, 1980.

[11]We note that at the time Mitchell sought to withdraw from the special rate proceeding, it had completed only 44 of the 125 wells it had agreed to drill within the five-year settlement period, notwithstanding the fact that almost two-thirds of that period had expired. Thus, while Mitchell had not fulfilled its portion of the special rate agreement at the time it withdrew, it argues that it was still entitled to the benefits of that agreement. It is apparent that Mitchell obtained substantial benefits by withdrawing from the agreement. It became eligible for the 50 cent per Mcf national rate which later increased to 93 cents per Mcf for wells commenced between January 1, 1973 and January 1, 1975, and it qualified for the new national rate of $1.42 per Mcf for the 81 wells it continued to drill as part of its withdrawal agreement. In light of these factors and those previously discussed, the Commission did not abuse its discretion in determining that the equities of this case did not compel a waiver of Mitchell's refund obligation.

THE REFUND FLOOR

Having found that the Commission was within its discretion to require Mitchell to refund the excess of the special rates it collected over the applicable just and reasonable area rates, the question arises as to the proper refund floor which should be used in calculating Mitchell's obligation. Mitchell contends that, if refunds are to be imposed, the Commission should recognize the Opinion No. 749 rate (23.5 cents per Mcf with respect to flowing gas) as a refund floor. Opinion No. 749 became effective July 1, 1976; prior to its enactment, the rate charged for flowing gas was 18.5 cents per Mcf as established in Opinion No. 607. Mitchell reads one provision of Opinion No. 749 as authorizing the application of the 23.5 cent rate for flowing gas and accordingly, we shall respect the Commission's do not read Opinion No. 749 as authorizing the retroactive application of the 23.5 cent rate for flowing gas and accordingly, we shall respect the Commission's interpretation of the effect of Opinion No. 749 on the computation of refunds during the time period in which Opinion No. 607 rates were applicable. *See South States Oil & Gas Company v. FERC*, 653 F.2d 1052 (5th Cir. 1981). As the Commission stated, it would be inconsistent with their determination that Mitchell should be treated as all other Southwest producers if anything other than the area rate applicable during the locked-in period was used to compute Mitchell's refund obligation. Therefore, we must dismiss Mitchell's final claim.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Matthew Holden, Jr., and George R. Hall,

Mitchell Energy Corporation) Docket No. RI73-60

ORDER DETERMINING REFUND OBLIGATION
ON REMAND AND ORDERING REFUNDS

(Issued August 8, 1980)

BACKGROUND:

This proceeding has been remanded by the Court of Appeals for the Fifth Circuit.[1] At issue is a determination of Mitchell Energy Corporation's (Mitchell) refund obligation, if any, arising from Mitchell's withdrawal of a petition for special relief.

The petition for special relief was filed August 11, 1972 by George Mitchell and Associates (now Mitchell Energy Corporation) seeking collection of a rate in excess of the applicable weighted average area rate of 18.5 cents per Mcf for the Other Southwest Area (OSWA) producers established in Opinion No. 607[2] for sales of natural gas to Natural Gas Pipeline Company of America (Natural) from the Wise County area in Texas. The parties subsequently agreed to a settlement which was approved by the Commission[3] in Opinion No. 649[4] on February 21, 1973. Pursuant to the

[1]*Mitchell Energy Corporation v. F.E.R.C.*, 580 F.2d 763 (5th Cir. 1978).

[2]Opinion No. 607, *Area Rate Proceeding (Other Southwest Area)*, 46 F.P.C. 900 (1971). The special relief provision for the OSWA is found at Section 154.109a(e) of the Commission's Regulations, 18 C.F.R. §154.109(e).

[3]This proceeding was commenced before the FPC. By the joint regulation of October 1, 1977 (10 CFR 1000.1) it was transferred to the FERC. The term "Commission" when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

[4]Opinion No. 649, *Opinion and Order Granting Special Relief and Terminating Proceedings*, 49 F.P.C. 424 (1973).

settlement Mitchell was to receive 30.25 cents per Mcf for all sales (both old and new gas) from the Wise County area. Mitchell agreed to drill an additional 125 wells in Wise County (all sales from this drilling to be to Natural), to pay for installation of additional compression on Natural's gathering system, and to spend approximately $16.5 million on drilling activity in the continental United States ($9 million of which would be spent drilling the 125 wells for Natural) during a five-year period commencing January 1, 1973.

Upon challenge of Congressmen Macdonald and Yates[5] the proceeding was remanded for reconsideration of the reasonableness of the settlement considering Mitchell's cost of production in Wise County and the profits it could expect over the life of the new and old wells in that region.

Hearings were held on the remanded proceeding and the case was certified to the Commission. Prior to a Commission decision however, Mitchell filed a motion to withdraw its special relief application which had produced the settlement approved in Opinion No. 649, and to begin collecting the national rates established in Opinion Nos. 699[6] and 749[7] on all of its wells. Mitchell's motion also requested that it be allowed to keep monies collected in excess of the OSWA rate pursuant to the settlement agreement.

By order issued May 20, 1976 the Commission allowed Mitchell to withdraw its special relief application, thus mooting the related settlement proceeding which was pending Commission consideration on remand from the court in *Macdonald,* and to begin collecting the national rates for the old or new gas in lieu of the settlement rate, effective April 20, 1976. In consideration thereof Mitchell agreed to complete the 125 wells agreed to in the original

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[5]*Macdonald v. F.P.C.*, 505 F.2d 355 (D.C. Cir 1974), *cert denied*, 421 U.S. 912 (1975)

[6]Opinion No. 699, *Just and Reasonable National Rates For Sales of Natural Gas from Wells Commenced On Or After January 1, 1973, and new Dedications of Natural Gas To Interstate Commerce On Or After January 1, 1973*, 51 F.P.C. 2212 (1974).

[7]Opinion No. 749, *Just and Reasonable National Rates for Sales of Natural Gas In Wells Commenced to January 1, 1973*, 54 FPC 3090 (1975).

settlement and to grant Natural a preferential right to bid on any new gas developed in Texas within 40 miles of Natural's facilities. The Commission did not authorize Mitchell to keep the monies collected pursuant to the settlement rate in excess of the OSWA rate, but set this issue for hearing, permitting the parties "to develop a record of facts, law and equities involved in any refund decision."

At the hearing on the refund phase Mitchell presented cost evidence to demonstrate that the costs associated with production from its Wise County wells exceeded its revenues from these wells during the locked-in period (period that settlement rate was in effect). Mitchell's cost presentation to determine "flowing" gas costs for old gas in the Wise County area reflected the methodology employed by the Commission to determine just and reasonable rates for individual producers prior to the transition to area and nationwide pricing.[8] Mitchell claims that its just and reasonable rate for the locked-in period exceeded both the OSWA rate and the settlement rate, and that no refunds were owing.

The presiding judge concluded however, that any determination of Mitchell's cost of production for its old and new wells in the Wise County area must be governed by the evidentiary standard for special relief set forth in *Macdonald*. This initial decision was affirmed by the Commission in Opinion No. 649-B issued July 19, 1977. The Commission also stated that it disagreed with Mitchell that it had to find a just and reasonable rate for the gas involved in this proceeding, and concluded that a "determination of the appropriate just and reasonable rate for this gas has been made in the appropriate area and national proceedings".

The Fifth Circuit vacated Opinion No. 649-B finding that the Commission erred in holding that the *Macdonald* evidentiary standard for special relief "must be controlling as a plenary rule of evidence in this refund case." The

[8]This is based upon the use of samples, company-wide allocations, and fixed rates of return and taxes establishing costs of production for a certain period of time.

proceeding was remanded for a determination of Mitchell's refund obligation in accordance with evidentiary standards ordinarily used by the Commission in determining just and reasonable rates and refund liability.The Court stated that the Commission must conform itself to its prior decisions or explain the reason for its departure.

Following the Court decision the Commission provided the parties further opportunity to comment on "the appropriate steps to be taken by the Commission in light of the opinion of the Fifth Circuit."[9] Mitchell, Natural, and the staff responded to the Commission's order.

POSITION OF THE PARTIES:

The staff contends that the Court's decision that the Commission must proceed on remand using evidentiary standards by which just and reasonable rates and refund obligations ordinarily are determined or explain the reasons for departing from these standards, supports a finding that Mitchell should make refunds of more than $9 million dollars. The staff alleges that the appropriate just and reasonable rate for Mitchell during the locked-in period is the appropriate area and national rates. According to staff, Mitchell's refund obligation is the amount of monies collected in excess of the applicable area and national rate for OSWA producers during the locked-in period. Staff argues that Mitchell should not be allowed to introduce evidence that its costs from the Wise County wells exceeded revenues collected from these wells under the settlement rate, since this would be tantamount to treating the refund phase as a special relief proceeding. The staff further contends that Mitchell has presented no compelling equitable arguments as to why such obligation should be waived.

Mitchell alleges that the Commission's May 20 order establishing the refund phase of this proceeding provided for the introduction of cost evidence to determine whether

[9]*Order Providing For Comments on Procedure After Remand*, issued March 28, 1979.

Mitchell's costs exceeded its revenue during the locked-in period; and if so, whether refunds would be appropriate.[10] It is argued that the Court believed Mitchell's costs to be relevant to a determination of refund liability, since the opinion concluded that the Commission evaluated those costs using an inappropriate evidentiary standard, namely the *Macdonald* special relief standard. According to Mitchell, such a finding would have been unnecessary if Mitchell's cost evidence was irrelevant to a determination of its refund liability. Mitchell and Natural also request that the Commission consider amounts spent by Mitchell in carrying out the terms of the settlement in determining refund liability.

DISCUSSION AND FINDINGS

As noted at the outset of this order the issue before us involves a determination of Mitchell's refund obligation, if any, arising from its withdrawal of an application for special relief. Initially, the proper method of calculating Mitchell's refund liability must be determined. The mandate of the Fifth Circuit requires that the evidentiary standard employed by the Commission must be that by which just and reasonable rates and refund obligations ordinarily are determined. The use any other standard requires us to explain the reasons for our departure.

The essential first step in calculating Mitchell's refund obligation during the locked-in period involves a determination of the appropriate just and reasonable rate for Mitchell. A producer's refund obligation is ordinarily the difference between the rate collected and the applicable just and reasonable rate.

Since *Permian*[11] just and reasonable rates for individual producers have been determined in the appropriate area

[10]Mitchell also requested that the Commission grant oral argument. The comments of the participants adequately set forth their contentions and, oral argument is not necessary to resolve the issues in this proceeding. Accordingly, Mitchell's request is denied.

[11]*Permian Basin Area Rate Case*, Opinion No. 465, 34 FPC 159 (1965).

and national rate proceedings. The area/national rates do not guarantee each and every producer a profit on its sales of gas. Some producers' costs may be above those rate levels and some producers' costs may be below. To the extent that a producer believes that its operations place it in a revenue deficient position it may seek to collect more than the area/national rates through the special relief provisions. Here, Mitchell opted to withdraw its request for special relief consideration for its Wise County operations during the locked-in period. In so doing it assumed the same risks to which other producers during the locked-in period operating under the area/national rates scheme were exposed (*i.e.*, not guaranteed a profit on its gas sales under the appropriate area/national rates).

In the circumstances, the question of whether Mitchell's cost of production from the Wise County wells during the locked-in period exceeded revenues from these wells under the OSWA rate and/or the settlement rate is irrelevant to this proceeding. We recognize that confusion was caused by the May 20 order setting the refund issue for hearing and by the subsequent proceedings before the administrative law judge and the Commission from which it could easily have been inferred that such cost evidence could be considered. The May 20 order however, does not specifically authorize Mitchell to introduce evidence of its cost of production from the Wise County area to determine its refund obligation.

In our view, to consider Mitchell's cost of production from its Wise County wells in this refund proceeding would be contrary to the ordinary method of determining just and reasonable rates and refund liability. By the May 20 order Mitchell was permitted to withdraw its special relief application *entirely*. The effect of this was to put Mitchell in the position it would have been in had it never filed for special relief. Mitchell had requested that the Commission allow it to collect the special relief settlement rate up to the effective date of the withdrawal of its special relief application. Granting this request would have given Mitchell the benefit of the special relief settlement rate for that period of time when such rate was higher than the OSWA rate collected by Other Southwest area producers, and allow it to

renounce the settlement when the appropriate rates for the OSWA producers exceeded the special relief settlement rate. Mitchell had attempted previously to achieve this result with respect to the wells to be drilled pursuant to the settlement by filing a rate increase proposal to change its special relief settlement rate for these wells. Mitchell's rate increase filing was rejected by the Commission as inconsistent with the specific terms of its settlement which provided for a specific rate increase of one cent per Mcf and a renegotiation of the base rate after five years. That decision was upheld by the Fifth Circuit in *Mitchell Energy Corporation* v. *F.P.C.* 519 F.2d 36, (1975) which held that Mitchell's alternatives prior to the expiration of the rate limitations in its settlement agreement in 1977 were "to waive entirely its own special relief or to abide by the terms of its settlement and wait until 1977 to renegotiate the contractual price."

We believe it would be contrary to the present regulatory scheme to allow Mitchell, in effect, to renew its withdrawn special relief request in the refund phase of this proceeding. Mitchell's introduction of cost evidence to show that its costs of production from the Wise County wells exceeded revenues from these wells during the locked-in period in order to calculate its refund obligation on a basis other than using the applicable OSWA rate represents another attempt to accomplish what it had sought previously through its rate increase filing and through, in effect, an unwarranted *post hoc* unilateral interpretation of the withdrawal of the special relief request as being only a partial withdrawal of the request. Mitchell's refund obligation should therefore be measured by the difference between the amounts collected pursuant to the special relief settlement rate, and the rates to which it would have been entitled had it never requested special relief.

We are not persuaded that the equities involved require a complete or partial waiver of Mitchell's refund obligation. Mitchell's contention is that it undertook an expanded Exploration and Development (E & D) program in reliance on

the special relief settlement rate.[12] In addition, it spent approximately $2 million for additional compression facilities in Wise County. According to Mitchell, these resources would have been allocated to other, more profitable endeavors, but for the settlement.

The Commission will consider cost evidence in the context of weighing equities in normal refund cases[13]. But in this case we do not reach the cost question because of the factor of Mitchell's election to withdraw from the settlement. This was a business decision which Mitchell believed would be more beneficial economically than continuing to operate in Wise County pursuant to the settlement. In view of its election Mitchell should be estopped from requesting that costs associated with its special relief application be considered to reduce its refund obligations. As noted in the initial decision, under the settlement agreement, Mitchell was required to drill 125 wells, and to sell the gas to Natural for 30.25 cents during the settlement period. By allowing withdrawal, the Commission permitted Mitchell ultimately to collect the national rate of $1.42 rather than the settlement rate of 30.25 cents per Mcf for gas from the remaining 81 wells to be drilled.

Consistent with the concept that withdrawal of the special relief application should place Mitchell in *status quo ante* Mitchell should receive the same rate treatment that it would have received had it never filed for special relief. Accordingly, in calculating Mitchell's refund obligation we will apply the Opinion No. 607 weighted average rate of 18.5 cents per Mcf, and where appropriate the Opinion No. 749 rate of 23.5 cents per Mcf, effective as of January 1, 1976, for

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[12]Approximately $5 million in Wise County and over $25 million nationwide.

[13]See, *Consumer Federation of America v. FPC*, 515 F.2d 347, 359, (D.C. Cir. 1975).

flowing gas from wells drilled prior to January 1, 1973,[14] and the Opinion No. 699-H national rate of 50 cents per Mcf, effective as of June 21, 1974, for flowing gas from wells drilled after January 1, 1973.[15]

Based on the foregoing, we conclude that Mitchell's refund obligation amounts to $9,182,556[16] plus applicable interest for sales from the Wise County area during the locked-in period.

The Commission orders:

(A) Within 60 days from the date of this decision, Mitchell shall disburse to Natural for flow-through to its customers the amount of $9,182,556 plus applicable interest calculated in accordance with the Commission's rules and regulations.

(B) Within 75 days from the date of this decision Mitchell shall file three copies of (1) a final refund report showing separately the principal and interest calculated in

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[14]Mitchell requests use of the Opinion No. 749 rate in calculating its refund obligation for gas from the old wells during the entire locked-in period. Its argument is that it was collecting the settlement rate subject to refund and that Opinion No. 749 made that rate applicable for refund determination for producers whose § 4(e) or § 7(c) dockets were consolidated with Docket No. R-478. However, this proceeding was not consolidated with Docket No. R-478, and during the time that the Opinion No. 607 weighted average rate of 18.5 cents was effective for OSWA producers, there was a moratorium on rate filings above this ceiling for these producers. Thus, no OSWA producers, including Mitchell, could have had a § 4(e) rate filing to collect more than the Opinion No. 607 rate subject to refund. Use of the Opinion No. 749 rate to compute refund liability is therefore not available to Mitchell.

[15]Mitchell calculates that its refund obligation for the locked-in period would be decreased by about $420,112 applying Opinion No. 749 rates to sales which would have been covered by these rates in the absence of collection of the settlement rate, and by about $572,103 applying the appropriate Opinion No. 699-H rates to its sales.

[16]This amount was calculated by Mitchell pursuant to the presiding judge's initial decision and represents the difference between the rate approved in Opinion No. 649 and the applicable OSWA rate applied to all sales volumes from the Wise County area, less adjustments for sales for which Opinion No. 699-H and Opinion No. 749 rates are applicable from February 21, 1973 through April 19, 1976.

accordance with Section 154.102(d) of the regulations and (2) a release from Natural with respect to the refunds.

(C) Within 90 calendar days following receipt of the subject refund Natural shall flow through, in cash, the jurisdictional portion of all monies received based upon the actual billing determinents for the refund periods involved. Natural shall be required to pay interest in accordance with Section 154.67 of the Commission's regulations from date of disbursement, provided that, if Natural distributes the subject refunds by the end of the calendar month in which subject refund was received they shall not be required to pay any interest thereon. Within 15 days of disbursement Natural shall submit a report showing its computation of refunds paid.

(D) Upon notification by the Commission's Secretary and to the extent directed thereby, Natural shall proceed with the distribution of refunds to their jurisdictional customers.

(E) The Secretary shall cause prompt publication of this Order in the Federal Register.

By the Commission
(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Charles B. Curtis, Chairman;
Georgiana Sheldon, Matthew Holden, Jr.
George R. Hall and J. David Hughes.

Mitchell Energy Corporation)	Docket No. RI73-60

ORDER DENYING APPLICATION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT AND GRANTING REQUEST FOR STAY

(Issued October 7, 1980)

On September 8, 1980 Mitchell Energy Corporation (Mitchell) filed an Application for Rehearing, Request for Oral Argument and Request for a Stay in this proceeding. The filing relates to the Commission's order issued August 8, 1980 which determined Mitchell's refund obligation on remand arising from Mitchell's withdrawal of a petition for special relief.

The arguments presented on rehearing have been advanced previously by Mitchell in this proceeding and have been adequately considered by the Commission. Accordingly, the application for rehearing will be denied. A similar conclusion is warranted with respect to Mitchell's request for oral argument. The Commission denied a similar request in its August 8 order and no new arguments have been presented.

We do find, however, that sufficient reasons exist for granting Mitchell's request for a stay pending the outcome of judicial review. The issue of Mitchell's refund liability in this proceeding presents complex legal questions. The matter has

been considered previously by the United States Court of Appeals for the Fifth Circuit and a stay was granted by the Court pending judicial review.

The Commission orders:

(A) The Application for Rehearing and the Request for Oral Argument filed by Mitchell Energy Corporation on September 8, 1980 is hereby denied.

(B) Mitchell's Request for a Stay of the Commission's Order of August 8, 1980 in this proceeding will be granted and such order will be stayed pending the completion of all permissible reviews.

By the Commission.

Lois D. Cashell,
Acting Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Fifth Circuit*

No. 80-2304

FERC RI73 60

MITCHELL ENERGY CORPORATION,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission

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Before CHARLES CLARK, GARZA and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Mitchell Energy Corporation, for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of the order of the Federal Energy Regulatory Commission in this cause be, and the same is hereby affirmed.

DECEMBER 3, 1981

ISSUED AS MANDATE:

***Former Fifth Circuit Case, Section 9(1) of Public Law 96-452, October 14, 1980.**

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

UNIT A

NO. 80-2304

MITCHELL ENERGY CORPORATION,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 3, 5 Cir., 1981, ____ F.2d ____).

(January 13, 1982)

Before CHARLES CLARK, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

APPENDIX F

15 U.S.C. §717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of theCommission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate,

charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus

made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(June 21,1938,ch.556,§ 4, 52 Stat. 822; May 21, 1962, Pub. L87-454, 76 Stat. 72.)

§717d. Fixing rates and charges; determination of cost of production or transportation.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract, affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatorily, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on

file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556. § 5, 52 Stat. 823.)

§717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it has filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable

notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court of leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as

to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Opposition

Office-Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1596

In the Supreme Court of the United States

OCTOBER TERM, 1981

MITCHELL ENERGY CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Washington, D.C. 20426

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission acted within the lawful bounds of its discretion in ordering that a producer of natural gas that had entered a settlement agreement to obtain rates higher than the then prevailing area rates, must refund the difference after withdrawing from the settlement agreement in order to qualify for newly adopted, higher national rates.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1596

MITCHELL ENERGY CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 662 F. 2d 1111. The earlier opinion of the court of appeals is reported at 580 F. 2d 763. The orders of the Federal Energy Regulatory Commission (Pet. App. A-10 to A-21) are reported at 12 F.E.R.C. para. 61,144 and 13 F.E.R.C. para. 61,024.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-22) was entered on December 3, 1981. A petition for rehearing was denied on January 13, 1982 (Pet. App. A-23 to A-24). The petition for a writ of certiorari was filed on February 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATEMENT

1. In 1972, Mitchell Energy Corporation, an independent producer of natural gas that sells natural gas for resale in interstate commerce, entered into a settlement agreement that granted Mitchell special relief from certain area rates established for producers in the Other Southwest Area (OSWA).[1] Prior to this agreement, Mitchell had lawfully been charging area rates averaging 18.859 cents per Mcf for gas sales. Under the settlement approved by the Commission,[2] Mitchell was permitted to increase this rate to 30.25 cents per Mcf for all sales to its customer, Natural Gas Pipeline Company of America (Natural) (Pet. App. A-2, A-10 to A-11). In return, Mitchell agreed, *inter alia*, to drill at least 125 additional gas wells in Wise County, Texas, to sell all gas from these wells to Natural at the settlement rate, and to spend $16.5 million in drilling activities in the United States. In addition, there was to be an automatic price increase of one cent per Mcf and renegotiation of the thirty cent base rate every five years, beginning in 1977 (*id.* at A-2).

On judicial review of the settlement in the United States Court of Appeals for the District of Columbia Circuit (and after Mitchell had begun collecting its new "special relief" rate), the case was remanded to the Commission on the ground that there was insufficient evidence to conclude that Mitchell would not earn excessive profits by charging the

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[1] Those area rates had been established by the Commission in *Opinion No. 607, Area Rate Proceeding (Other Southwest Area)*, 46 F.P.C. 900 (1971), on rehearing, *Opinion No. 607-A*, 47 F.P.C. 99 (1972), aff'd *sub nom. In re Other Southwest Area Rate Case (OSWA I)*, 484 F. 2d 469 (5th Cir. 1973), cert. denied *sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 973 (1974).

[2] *Opinion No. 649, Opinion and Order Granting Special Relief and Terminating Proceedings*, 49 F.P.C. 424, 428-429, rehearing denied, *Opinion No. 649-A*, 49 F.P.C. 1434 (1973).

30.25 cent rate. *MacDonald* v. *FPC*, 505 F. 2d 355, 363 (D.C. Cir. 1974), cert. denied *sub nom. George Mitchell & Associates, Inc.* v. *MacDonald*, 421 U.S. 912 (1975).

2. While the *MacDonald* case was pending before it on remand from the District of Columbia Circuit, the Commission established a national rate of 42 cents per Mcf (increased to 50 cents on rehearing) for gas from wells drilled after January 1, 1973,[3] and 23.5 cents per Mcf (increased to 29.5 cents per Mcf as of July 1, 1976) for flowing gas from wells commenced prior to January 1, 1973.[4] Mitchell thereupon moved to withdraw from the settlement and to begin collecting the higher national rate (Pet. App. A-11). Mitchell also requested that it be allowed to keep all amounts collected under the settlement agreement (*ibid.*).

The Commission granted Mitchell's request to withdraw from the settlement. However, following a hearing on the question of Mitchell's refund obligation, the Commission concluded that under the evidentiary standards enunciated in the *MacDonald* case, Mitchell should refund any amounts in excess of those Mitchell could have collected if it had not been granted special relief (Pet. App. A-4). On appeal, the Court of Appeals for the Fifth Circuit remanded the case, finding that the Commission erred in treating the

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[3] *Opinion No. 699, Just and Reasonable National Rates for Sales of Natural Gas*, 51 F.P.C. 2212 (1974), rehearing granted in part and denied in part, *Opinion No. 699-H*, 52 F.P.C. 1604 (1974), aff'd *sub nom. Shell Oil Co.* v. *FPC*, 520 F. 2d 1061 (5th Cir.), rehearing denied, 525 F. 2d 1261 (1975), cert. denied *sub nom. California Co.* v. *FPC*, 426 U.S. 941 (1976).

[4] *Opinion No. 749, Just and Reasonable National Rates for Sales of Natural Gas*, 54 F.P.C. 3090 (1975), on rehearing, *Opinion No. 749-C*, 56 F.P.C. 303 (1976), aff'd in part and set aside in part *sub nom. Tenneco Oil Co.* v. *FERC*, 571 F. 2d 834 (5th Cir.), cert. denied, 439 U.S. 801 (1978).

evidentiary requirements of *MacDonald*, which was a special relief case, as controlling in this refund case (*ibid.*). *Mitchell Energy Corp.* v. *FERC*, 580 F. 2d 763, 765 (5th Cir. 1978) (*Mitchell I*).

In accord with the Fifth Circuit's ruling, the Commission on remand considered the case anew, solely as a refund case (Pet. App. A-10 to A-19). After an evaluation of all the equities, the Commission concluded that Mitchell should refund all amounts collected in excess of the appropriate area and national rates in effect during the period of the settlement (*id.* at A-16 to A-18).

The court of appeals affirmed (Pet. App. A-1 to A-9). The court found that the Commission had complied with the mandate of *Mitchell I*, and had acted within its discretion in ordering the refund (Pet. App. A-6). As the court pointed out (*id.* at A-7):

> To excuse Mitchell from any refund obligation would permit it to obtain "dual" benefits. Mitchell would receive the benefit of the special relief settlement rate when such rate exceeded the OSWA rate and, when the OSWA rate surpassed the special relief rate, Mitchell could abrogate its special relief settlement agreement and charge its customers according to the area rates.

The court concluded that in these circumstances the Commission legitimately exercised its discretion in ordering the refund, and that any variation from the evidentiary standard for determining just and reasonable rates and refund obligations (to the extent there was any such variation) "was adequately justified and explained" (Pet. App. at A-8).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court. Moreover, resolution of the concededly "unusual"

question presented (Pet. 7) turns on the application of settled principles to the particular circumstances of this case. Accordingly, further review by this Court is not warranted.

1. In essence, this case concerns a producer's efforts to shift to and from special status at its option in order to obtain the highest rate it lawfully could obtain for its gas. As the court of appeals held, the Commission in this unusual situation could utilize its equitable authority to preclude such a "dual benefit." Thus, the Commission reasonably ruled that when the producer in this case chose to return to normal producer status in order to collect a higher rate, it should not be heard to complain because the Commission determined that the producer should be treated, for refund purposes, as if it had retained its normal status all along.

2. Petitioner principally contends (Pet. 7-11), however, that in determining that a refund was due, the Commission erred in failing to consider whether petitioner's individual costs exceeded its revenues. This claim is without merit.

To begin with, average producer costs were fully considered by the Commission in promulgating national and area rates.[5] Furthermore, costs need not be the paramount consideration in a refund case. Thus, as the court of appeals properly observed, "no case holds that individual cost-of-service must form the principal basis for determining refunds" (Pet. App. A-8 n.10). Indeed, the court in *Consumer Federation of America* v. *FPC*, 515 F. 2d 347 (D.C. Cir.), cert. denied, 423 U.S. 906 (1975), the case on which petitioner principally relied before the court of appeals, recognized that many factors other than costs are properly

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[5]See *Opinion No. 607, supra* note 1, 46 F.P.C. at 912-913; *Opinion No. 699, supra* note 3, 51 F.P.C. at 2238-2251; *Opinion No. 749, supra* note 4, 54 F.P.C. at 3094-3096.

considered in arriving at an equitable disposition of refund matters (see Pet. App. A-8 n.10).

Similarly, there is no merit to petitioner's argument that the decision below "is inconsistent with the rationale of prior decisions" (Pet. 9). On the contrary, the court's ruling accords with settled legal principles. Thus, existing case law establishes that the Commission's authority to order refunds rests within the broad range of its discretion, to be exercised with "due weight to considerations of equity." *Estate of French* v. *FERC*, 603 F. 2d 1158, 1163 (5th Cir. 1979). See *Continental Oil Co.* v. *FPC*, 378 F. 2d 510, 532 (5th Cir. 1967); *Public Service Commission of New York* v. *FPC*, 329 F. 2d 242, 250 (D.C. Cir.), cert. denied *sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 (1964); *Consumer Federation of America* v. *FPC, supra*, 515 F. 2d at 359. Moreover, the Commission's determination must be upheld if it was made on a rational basis. See *Estate of French* v. *FERC, supra*, 603 F. 2d at 1163; *Gillring Oil Co.* v. *FERC*, 566 F. 2d 1323, 1326 (5th Cir.), cert. denied, 439 U.S. 823 (1978). Having found that the reasons set forth in the Commission's order reflected a rational exercise of discretion (Pet. App. A-6), the court of appeals properly upheld the Commission.[6]

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[6]The cases cited by petitioner (Pet. 9-10) are simply not on point. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), is a rate case and does not purport to set refund standards. *Wisconsin* v. *FPC*, 373 U.S. 294 (1963), and *City of Chicago* v. *FPC*, 458 F. 2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972), were properly distinguished by the court of appeals (Pet. App. A-8 n.10). Refunds were not at issue in *City of Chicago*, and in *Wisconsin* the refunds in dispute involved rates that were not subject to area rate regulation because they had been set before the establishment of area rates. (The first Commission case to establish area rates as just and reasonable was issued in 1965. See *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Freeport Oil Co.* v. *FPC*, 638 F. 2d 702, 706 (5th Cir. 1980).) Individual cost evidence therefore had to be considered in *Wisconsin* because, unlike the present case, there was no other logical basis for computing the proper refund obligation.

Nevertheless, petitioner argues (Pet. 15) that the decision below sanctions a Commission refund order issued without assessment of all equitable factors. According to petitioner, the Commission failed to consider that Mitchell had incurred costs in reliance on the special relief order, that these efforts benefitted interstate customers, and that there was in these circumstances no "mechanism to restore Mitchell to the *status quo ante*" (*id.* at 15-16).

It is clear, however, from the Commission's order requiring refunds that the Commission *did* consider all relevant factors in arriving at its decision (see Pet. App. A-14 to A-17). Petitioner's real dispute goes to the *weight* that should be accorded these factors. It was the Commission's judgment that the factors cited by Mitchell simply were outweighed by Mitchell's business decision to withdraw from the settlement in order to take advantage of the higher national rate. As the Commission noted, by withdrawing from the agreement, Mitchell would be able "to collect the national rate of $1.42 rather than the settlement rate of 30.25 cents per Mcf for gas from the remaining 81 wells to be drilled" (*id.* at A-17). Thus, the Commission reasoned, "Mitchell should receive the same rate treatment that it would have received had it never filed for special relief" (*ibid.*). It was the Commission's judgment, affirmed by the court of appeals, that equitable considerations could not support giving Mitchell the benefit of the special relief rate while it was higher than the area rate, and then allowing Mitchell to renounce the settlement when national rates exceeded the relief rate (*id.* at A-15 to A-16; see *id.* at A-7). There is no reason to disturb that ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1596

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner, Mitchell Energy Corporation ("Mitchell") respectfully submits this brief in reply to the brief in opposition submitted by the Federal Energy Regulatory Commission ("Commission").

In its brief, the Commission makes the incredible assertion that its decision, while involving the resolution of a concededly "unusual question," is based on "the application of settled principles." Thus, further review by this Court, it contends, is not warranted. Brief in Opposition, pp. 4-5. The Commission maintains that:

> (a) It was not required to consider Mitchell's individual costs in determining its

refund obligation for the locked-in period, February 1973 to May 1976, but could rely solely on the OSWA[1] rates which were based on 1964 average industry costs; and

(b) It, in fact, gave full consideration to all relevant equitable factors and that Mitchell's real dispute involves the weight given to the various factors and not whether they were considered at all.

There is simply no basis in law or fact for the Commission's position. By stating that it need not consider Mitchell's individual costs because it based its refund order on OSWA rates, the Commission conveniently ignored established precedent. Equally as important, the Commission ignored the fact that Mitchell cannot be placed on the same footing as other OSWA producers who did not undertake the extraordinary exploration and development program imposed upon Mitchell by the Commission in Opinion No. 649. Similarly, the Commission's self-serving statement that the real dispute is over the weight given to the equitable factors is nothing more than a thinly-veiled attempt to gloss over a fatal deficiency in its order: it never gave any consideration to those equitable factors which courts have required it to consider. *Consumer Federation of America v. FPC*, 515 F.2d 347 (D.C. Cir.), *cert. denied*, 423 U.S. 906 (1975).

1. While acknowledging that costs are a relevant factor in all refund proceedings, the Commission attempts to justify its use of the OSWA rates on the grounds that the area rate concept had replaced

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[1]Opinion No. 607, Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in the Other Southwest Area, 46 FPC 900 (1971), *on rehearing*, Opinion No. 607-A, 47 FPC 99 (1972), *aff'd*, Shell Oil Co. v. FPC, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom.* Mobil Oil Corp. v. FPC, 417 U.S. 973 (1974).

establishing producer rates on an individual company basis. This fact, the Commission asserts, made Mitchell's actual costs irrelevant and served to make the holding in *Wisconsin v. FPC*, 373 U.S. 294 (1963), inapplicable. There is no merit to this position.

This case does not involve setting prospective rates applicable to the industry at large on an area or nationwide basis — a regulatory approach adopted for administrative expediency.[2] Rather, it involves Mitchell's refund obligation for a locked-in period — a period during which it undertook an extraordinary exploration and development program in reliance upon a Commission approved settlement authorizing Mitchell to collect a rate above the OSWA ceiling. Moreover, shortly after issuing Opinion No. 649, the Commission acknowledged that the OSWA rates were inadequate and replaced them with new substantially higher nationwide rates based upon 1972 costs.[3] Under these circumstances, establishing Mitchell's refund obligation on the outdated OSWA rates ignores the acknowledged inadequacy of those rates and disregards Mitchell's individual cost evidence -- the

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[2]In approving the area rate concept this Court in *Permian* did so on the basis that individual producer costs could be examined under special circumstances. Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[3]Opinion No. 699, Just and Reasonable National Rates for Sale of Natural Gas from Wells Commencing On or After January 1, 1973, and New Dedication of Natural Gas to Interstate Commerce on or After January 1, 1973, 51 FPC 2212 (1974), *rehearing denied*, Opinion No. 699-H, 52 FPC 1604 (1974), *aff'd sub nom.* Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1261, *cert. denied sub nom.* The California Co. v. FPC, 426 U.S. 941 (1976); Opinion No. 749, Just and Reasonable National Rates for Sales of Natural Gas from Wells Commenced Prior to January 1, 1973 (Dec. 31, 1975), as amended by Opinion No. 749-C (July 19, 1976), *aff'd in part, rev'd in part*, Tenneco Oil Co. v. FERC, 571 F.2d 834 (5th Cir. 1978), *cert. denied*, 439 U.S. 801 (1979).

best evidence available to determine whether any refunds are required. Such an examination is required by *Wisconsin v. FPC, supra.*

2. Asserting that it had considered the equities, the Commission ordered full refunds so as to place Mitchell in the same position as all other OSWA producers and return it to the *status quo ante.* The refund order itself is devoid of any bona fide discussion of the material equitable factors. The Commission's decision and that of the Court below merely recite Mitchell's contentions. There is not even a perfunctory attempt to consider these factors, much less to state the reason why such factors were rejected, although those same factors have been given controlling weight in previous Commission and court refund cases.[4]

The Commission and the Fifth Circuit have erroneously characterized Mitchell's withdrawal of the petition as an attempt to escape the obligations of its special relief settlement and get the best of both worlds. This unfounded conclusion simply ignores the facts of record. The May 1976 Commission order permitting withdrawal was conditioned on Mitchell's completion of the 125 well program. Mitchell completed this program. The record also reflects that at the time the request was made to withdraw the petition for special relief, Mitchell had already expended over $25 million or $7 million more than it was obligated to spend by Opinion No. 649. Thus, it had incurred the burdens imposed by the settlement agreement. To deny Mitchell the opportunity to justify the settlement rate received deprives it of the opportunity to retain the revenues under the settlement. This result is punitive.

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[4]Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir.), *cert. denied,* 423 U.S. 906 (1975); Continental Oil Co. v. FPC, 378 F.2d 510 (5th Cir. 1967), *cert. denied sub nom.* Austral Oil Co. v. FPC, 391 U.S. 917 (1968).

Obviously, Mitchell cannot be placed in the *status quo ante* because there is no mechanism which will permit Mitchell to recoup the capital expenditures incurred in reliance upon the Commission order.

The capital expenditures made in reliance upon and in compliance with the Commission's special relief order resulted in substantial benefits to the interstate gas consumers. Absent Commission approval of the rate relief, those expenditures would not have been made. Equity warrants consideration of these factors in determining whether refunds are required. Although required by precedent, the Commission has failed to do so.

Because of the Commission's refusal to consider individual costs under the extraordinary circumstances of this case and its failure to consider the equitable factors, Mitchell submits that the Commission's decision, affirmed below, is clearly erroneous. Therefore, Mitchell urges that petition for certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the reply brief for petitioner was mailed, postage prepaid, to all counsel of record for the parties.

_____

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